

Abdi (Migration) [2018] AATA 2627 (27 July 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Safia Mohamed Abdi Ms Rahma Liban Mohamed Ms Samsan Mohamed Abdi Ms Maynuna Liban Mohamed Mr Sheikh-Abdirahim Liban Mohamed Ms Halima Liban Mohamed Ms Samira Gulled Mohamed
CASE NUMBER:	1702372
DIBP REFERENCE:	BCC2016/3035443
MEMBER:	Jan Redfern
DATE:	27 July 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the first named applicant's Partner (Migrant) (Class BC) Subclass 100 (Spouse) visa. The Tribunal has no jurisdiction with respect to the other applicants.

Statement made on 27 July 2018 at 4:35 PM

CATCHWORDS

MIGRATION – Partner (Migrant) (Class BC) visa – Subclass 100 (Spouse) – cancellation of visa under s.109 of the *Migration Act 1958* – whether incorrect information provided – information related to the birth of child who was not the biological child of the visa sponsor – whether the applicant no longer in a mutually exclusive relationship with the sponsor – failure to advise of a change in circumstances – ground for cancellation established in relation to the birth of the child but not in relation to the relationship – whether to exercise the discretion to cancel applicant's visa – consideration of prescribed circumstances including correct information, circumstances in which non-compliance occurred, applicant's present circumstances and subsequent behaviour – consideration of other relevant matters including

impact of consequential cancellations and best interests of the child– factors weigh in against cancelation – decision set aside

LEGISLATION

Migration Act 1958 (Cth), ss 101, 102, 103, 104, 105, 107, 109, 140

Migration Regulations 1994 (Cth), rr 2.41, 1.15A

Administrative Appeals Tribunal Act 1975 (Cth), s 19D

United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

CASES

Cao v Minister for Immigration and Anor (2007) FMCA 225

Nguyen v Minister for Immigration and Multicultural Affairs [2006] FCA 1699

Singh v the Minister of Immigration and Ethnic Affairs [1996] FCA 1429

Minister for Immigration and Citizenship v Khadgi (2010) 190 FCR 248

Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93

Zhao v Minister for Immigration and Multicultural Affairs [2000] FCA 1235

McDonald v Director-General of Social Security [1984] FCA 57; (1984) 1 FCR 354

Swan Television and Radio Broadcasters Ltd v Australian Broadcasting Tribunal (1985) 61 ALR 319

Jeganathan Nagalingam v Minister of Immigration, Local Government and Ethnic Affairs and

Noel Barnsley [1992] FCA 470

SECONDARY MATERIALS

Procedures Advice Manual – PAM3 'General visa cancellation powers (s 109, s 116, s 128 & s 140)'

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. The first named applicant, Mrs Safia Mohamed Abdi, arrived in Australia on 27 August 2014 as the holder of a Partner (Migrant) (Class BC) Subclass 100 (Spouse) visa. As part of the application for that visa, Mrs Abdi provided certain information as to her children and the nature of her relationship with the visa sponsor to the Department of Immigration and Citizenship, as it was then called, now the Department of Home Affairs (the Department).
2. On 2 February 2017, a delegate of the then Minister for Immigration and Border Protection cancelled the applicant's Subclass 100 (Spouse) visa on the basis that she had failed to notify the Department while her application was being considered about a change in her circumstances, namely the birth of a child who was not the biological child of the visa sponsor and that she was no longer in a 'spousal relationship' to the exclusion of all others. The visas of the second to seventh named applicants were cancelled automatically by operation of law under s 140 of the Act.
3. The Tribunal has jurisdiction to review a decision under the Act if an application is properly made under s.347 or s.412, or in limited circumstances not relevant to this application, under s.29 of the Administrative Appeals Tribunal Act 1975. Sections 338 and 411 of the Act and r.4.02(4) of the Migration Regulations 1994 set out the range of decisions that are reviewable in the Migration and Refugee Division of the Tribunal. The cancellation of a visa under s.140 is by operation of law and does not involve any decision.
4. As such, there is no reviewable decision it follows that the applications for review by the second to seventh named applicants were not properly made and the Tribunal does not have jurisdiction in this matter. However, the application by the first named applicant is reviewable and the Tribunal has jurisdiction to deal with this matter. For simplicity, the first named applicant is referred to in this decision as 'the applicant'.
5. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled under s.109(1) of the *Migration Act 1958* (the Act).

DECISION UNDER REVIEW AND BACKGROUND

6. The applicant is a citizen of Somalia and is 35 years old. On 11 April 2011, the applicant lodged an application for a combined Partner (Provisional) (Class UF) Subclass 309 and Partner (Migrant) (Class BC) Subclass 100 (Spouse) visa on the basis of her relationship with the visa sponsor, Mr Yahye Weli Sheikh-Abdi. The application included the applicant's four children, step-sister and niece as dependants. On the application form the applicant indicated she had four children and was in a relationship with the visa sponsor.
7. On 2 September 2011, the visa application was refused on the basis that the applicant did not satisfy the criteria for an offshore partner visa, namely the delegate was not satisfied the applicant and the visa sponsor had a mutual commitment to a shared life together. The applicant sought review of the decision by the former Migration Review Tribunal. On 12 October 2012, the decision to refuse the application was remitted by the former Tribunal for reconsideration with the direction that the applicant met the relevant criteria.
8. The applicant and the six dependant applicants were granted a Subclass 100 visa on 25 July 2014. The applicant and the visa sponsor subsequently separated and divorced in February 2016.

9. In April 2016, the applicant lodged an application for a Child (Migrant) (Class AH) Subclass 101 visa for her child who was born in Kenya in March 2014. The child is not the biological child of the visa sponsor.
10. On 21 December 2016, the applicant was notified of the intention by the delegate to consider cancellation of her Subclass 100 spousal visa under s.109 of the Act (the Notice). She was invited to respond to the particulars for the ground for cancellation raised in the Notice. The delegate noted the following particulars for the ground for cancellation:
- (1) In answer to question 38 of the 'Application for migration to Australia by a partner' form, the applicant provided particulars of her three daughters and one son.¹ In answer to question 77, being the question '*Has the relationship ceased?*' the applicant responded '*No*'.²
 - (2) At question 96 of the application, the applicant signed and dated a declaration to the effect that she had supplied information that was '*complete, correct and up-to-date in every detail*'.³ It was further noted on the application as follows:
 - I will inform the Department of Immigration and Citizenship of any changes to my personal circumstances (including change of address) while my application is being considered. I understand this also applies to my permanent migration / residence visa application.
 - I will inform the Department of Immigration and Citizenship if my relationship with my fiancé(e) or partner breaks down or ends in divorce, separation or death before this application is decided.⁴ [Emphasis in original]
 - (3) On 15 April 2016, the applicant lodged an application for her daughter, who was born in March 2014, to enter and reside in Australia on a Child (Migrant) (Class AH) Subclass 101 visa. The application indicated that the applicant gave birth to a child while her application for the partner visa was still pending to a third party being someone other than her sponsor.
 - (4) This was inconsistent with the answers she gave in her application to questions 38 and 77. The applicant had identified four children in her application and, with the birth of her fifth child, this was a new circumstance that made her answer to question 38 incorrect. The applicant's original answer to question 77 was incorrect on the basis that the birth of her child to a man other than her husband indicated she was no longer in a spousal relationship with the sponsor to the exclusion of all others. This was a new circumstance in respect of which she was obliged to advise the Department.
11. The applicant's migration agent provided a response to the Notice and further documents in support of the submissions. In the submissions, the representative disputed the allegations in the Notice and provided submissions as to why the applicant's visa should not be cancelled. The submissions were to the following effect:
- (1) The applicant's circumstances changed in 2013 when the visa sponsor advised her that the application for the spousal visa had been rejected and that he had divorced her. She felt alone at that time and was in financial difficulties. She had a brief sexual encounter with a man who lived in her village. He was charming, kind and assisted her financially.

¹ Tribunal file, folio 31 at [2].

² Tribunal file, folio 30 at [2].

³ Tribunal file, folio 30 at [3].

⁴ Ibid.

- (2) She felt ashamed about this encounter and was concerned about the views of the members of her community, given she was married.
- (3) The applicant fell pregnant as a result of this encounter but did not tell anybody at that time. The visa sponsor visited her in Kenya in July 2013 and told her that the application was likely to be approved. The applicant did not tell the visa sponsor about the affair or being pregnant at that time in the hope the visa sponsor would forgive her and that her marriage could be saved.
- (4) Once the visa was granted and the applicant moved to Australia, she told the visa sponsor about the child and the affair, after about two months, hoping he would understand. He did not understand and they separated. They were subsequently divorced.⁵
- (5) The answer to question 77 of the application was not incorrect because, as far as she was concerned, the affair was a brief encounter in circumstances where she was facing significant hardship. She thought that the sponsor did not wish to remain married to her but realised this was not the case when he came to see her in July 2013. The applicant did not tell him at that time because she did not wish to be abandoned in Kenya. She did not tell the Department about her child because she was concerned about this becoming public knowledge while she was still in Kenya and that she would be harmed and humiliated by the local community if they found out that she had a child with a person who was not her husband.
- (6) While it is correct that the applicant had a further child and therefore the answer to question 38 became incorrect, she was not in a position to advise the Department about the change in circumstances at that stage because of her own personal circumstances. This is relevant to the interpretation of s.104, which requires a visa applicant to advise of a change in circumstances 'as soon as practicable'.⁶
- (7) It would be unreasonable to expect the applicant to inform the Department about the change in circumstances where she believed the application had been rejected and the sponsor had divorced her. It was further submitted that when she realised this was not the case, it was neither reasonable nor practicable to expect the applicant to inform the Department about the change of circumstances at that time because it would have caused an immediate end to her marital relationship and would have exposed her to harm if members of her community in Kenya found out that she had a child with a person who was not her husband.⁷
- (8) In any event, the applicant's visa should not be cancelled and the circumstances of the non-compliance should be taken into account where she had little choice. Cancellation would have a devastating impact not only on her but her children.
- (9) The applicant has no citizenship or right to reside in any other country apart from Somalia, which was the country where her parents and other members of her family were persecuted.⁸ If the applicant is forced to return to Somalia she faces a real prospect of being killed or suffering serious harm because of her affair. Her children are still minors and 'deserve to live in Australia under the protection of the law'.⁹ It

⁵ Tribunal file, folio 64 at [3.1].

⁶ Tribunal file, folio 65.

⁷ Tribunal file, folio 65 (back) at [2.3].

⁸ Tribunal file, folio 64 (back) at [3.2].

⁹ Tribunal file, folio 64 (back) at [3.3.3].

would be 'cruel and unreasonable to separate the children from [her]'¹⁰ and the delegate should take into account the *Convention on the Rights of the Child* (CROC)¹¹.

(10) The applicant gave birth to a child in Australia in October 2016 and the child is an Australian citizen. In addition, the applicant's step-sister has given birth to a daughter, who is also an Australian citizen.¹² These children could also suffer harm and disadvantage if the applicant and the rest of the family was forced to return to Somalia.

12. On 6 February 2017, a delegate of the Minister cancelled the applicant's visa.¹³ The delegate concluded that the applicant had failed to comply with s.104 of the Act by failing to advise the Department of her change in circumstances, being the birth of her child in Kenya and the fact that she was no longer in a mutually exclusive relationship with her sponsor.¹⁴ There was non-compliance because the applicant did not update the information she provided in her application, first, in answer to question 38 about her children and, secondly, in answer to question 77 about her relationship with the sponsor. The delegate therefore found that the ground for cancellation had been established.¹⁵

13. Having decided the ground for cancellation arose, the delegate then considered whether the applicant's visa should be cancelled, having regard to her response and the prescribed circumstances set out in the *Migration Regulations 1994* (the Regulations). The delegate weighed the various factors set out in the Regulations, some of which were in favour and some of which were against her case.¹⁶ The delegate concluded at [76] and [77]:

76. When considering all the circumstances this case, I consider that the visa holder has not notified of a change of circumstances and therefore has not provided complete and correct information prior to the grant of her combined class UF/BC 309/100 Partner visa. Had the complete and correct information been provided it would have had a significant impact on the decision to grant the visa.

77. I have considered all relevant matters under 2.41 of the Migration Regulations 1994 and while I consider that there are some compelling reasons, I find that these are outweighed by the non-compliance. In making this assessment I have taken into account consideration of the fact that the visa holder has the option of applying for another visa that may be more suitable for her circumstances.¹⁷

14. The applicant applied for review of this decision and she was invited to attend a hearing in May 2017. The applicant was represented by a registered migration agent. She gave evidence and was supported in her application by two witnesses. The witnesses gave evidence about the difficult conditions the applicant would face if she was returned to Somalia. Following the hearing the applicant's representative provided further written submissions. Before the case could be finalised, the term of the appointment of the Presiding Member expired. The matter was reconstituted under s.19D of the *Administrative Appeals Tribunal Act 1975* to another member of the Tribunal.

15. The applicant was invited to a second hearing, at which she gave further evidence. Her sister, Ms Samsan Mohammed Abdi, who is the third applicant in the review, also gave evidence. The applicant's children, who were dependents in her application and therefore

¹⁰ Tribunal file, folio 63 at [3.3.3].

¹¹ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹² Tribunal file, folio 63 at [3.6].

¹³ Tribunal file, folios 14-38.

¹⁴ Tribunal file, folios 20-21 at [38]-[39].

¹⁵ Tribunal file, folio 20 at [41].

¹⁶ Tribunal file, folios 15-20.

¹⁷ Tribunal file, folio 15.

also applicants in the proceeding, did not attend or give evidence. The Tribunal took evidence from Dr Indi Pattni, clinical psychologist, by telephone. The applicant was supported at the hearing by members of the Somali community. They did not give evidence. Submissions were provided by the applicant's representative after the hearing.

RELEVANT LAW AND QUESTIONS FOR DETERMINATION

16. Subsection 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
17. Section 104 provides:
 - (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.
 - (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
 - (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
 - (4) Subsection (1) applies despite the grant of any visa.
18. While it is well established that civil law concepts such as 'onus' and 'standard of proof' are generally inappropriate in administrative decision-making,¹⁸ in cases where the existence of certain facts form the basis for the exercise of a statutory power, those facts must be established on the material available before the power can be exercised. In other words, the decision-maker must be satisfied about the existence of the facts before exercising the power. As such, the obligation is on the decision-maker to be satisfied and not on the former visa holder to establish the facts or grounds for cancellation do not exist: refer to *Zhao v Minister for Immigration and Multicultural Affairs* [2000] FCA 1235 (French, Hill and Carr JJ) at [25] and [32].
19. In deciding whether the ground for cancellation is made out, it is appropriate for the Tribunal to have regard to the nature of the allegations and the gravity of the consequences: refer *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93 (Flick and Perry JJ) at [120]. Relevant to the facts of this case, the cancellation of a permanent visa, where the visa holder has been residing in Australia for a number of years, has serious consequences and, in my view, any factual findings should be based on logical and probative material and not speculative information or inexact proofs.
20. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107 of the Act, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.

¹⁸ See *McDonald v Director-General of Social Security* [1984] FCA 57; (1984) 1 FCR 354, 357; *Swan Television and Radio Broadcasters Ltd v Australian Broadcasting Tribunal* (1985) 61 ALR 319, 324; *Jeganathan Nagalingam v Minister of Immigration, Local Government and Ethnic Affairs and Noel Barnsley* [1992] FCA 470 at [32].

21. Section 109 provides that if the Minister decides there has been non-compliance, the visa holder's visa may be cancelled after considering any response provided by the visa holder to the notice and having regard to 'any prescribed circumstances'.
22. The prescribed circumstances are set out in r.2.41 of the Regulations and are as follows:
 - (1) the correct information;
 - (2) the content of the genuine document (if any);
 - (3) whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document;
 - (4) the circumstances in which the non-compliance occurred;
 - (5) the present circumstances of the visa holder;
 - (6) the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act;
 - (7) any other instances of non-compliance by the visa holder known to the Minister;
 - (8) the time that has elapsed since the non-compliance;
 - (9) any breaches of the law since the non-compliance and the seriousness of those breaches; and
 - (10) any contribution made by the holder to the community.
23. While the factors specified in r.2.41 must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248.
24. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the department's Procedural Advice Manual (PAM3) '*General visa cancellation powers*'. This policy requires delegates to have regard to matters such as, whether there are persons in Australia whose visa would, or may, be automatically cancelled under s.140 of the Act, and whether the visa cancellation may result in Australia breaching its international obligations.
25. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements. Moreover, there was no submission to the contrary.
26. Accordingly, the questions for determination are:
 - (1) Was there non-compliance by the applicant in the way described in the notice, namely was there non-compliance with s.104 in the manner particularised?
 - (2) If the answer to (1) is yes, how should the discretion to cancel be exercised, having regard to any response to the notice, the prescribed matters and any other relevant considerations?

CONSIDERATION OF CLAIMS AND EVIDENCE

Was there non-compliance as described in the s.107 notice?

27. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.104 in the following respects:
- (1) The applicant was not in a genuine and continuing relationship with her sponsor to the exclusion of all others at the time of her visa grant and therefore did not comply with s.104 by failing to notify the Department of the change in her circumstances prior to the grant of her visa and her first entry to Australia as the holder of that visa. In particular, the fact that the applicant had given birth to a child with a man who was not her spouse did not appear to be consistent with someone who is in a genuine spousal relationship to the exclusion of all others. As such the applicant's answer to question 77 was incorrect and she had an obligation to notify the Department of the change of circumstances, which she did not do.
 - (2) The applicant did not advise the Department that she had given birth to another child which meant that her answer to question 38 was incorrect. She had an obligation to advise the Department of the new circumstances as soon as practicable, which she did not do.
28. In order to give context to the cancellation decision and the submissions made by the applicant it is convenient to outline the criteria for a partner visa to identify why the incorrect information was identified as being significant.
29. One of the criteria for a partner visa is that an applicant for the visa is the 'spouse' of the sponsor. Regulation 1.15A relevantly provides that a person is a spouse of another if they are in a 'married relationship'. Two people who are married to each other will be in a 'married relationship' if the Minister is satisfied that they have a mutual commitment to a shared life as a married couple to the exclusion of all others. An assessment of whether the claimed relationship involves a mutual commitment to a shared life requires an assessment of the subjective intentions of the parties: *Singh v the Minister of Immigration and Ethnic Affairs* [1996] FCA 1429 at [13].
30. In essence, in this case the delegate found that because the applicant had given birth to a child by another man, this demonstrated the information provided by her in the application that the relationship between her and the visa sponsor had not ceased was incorrect. This information was said to have become incorrect having regard the applicant's 'changed circumstances', the inference being that because she had a sexual relationship with another man her 'married relationship' with the visa sponsor had in fact ceased. There is no reference in the decision to the time when this obligation is said to have arisen but the inference is that the applicant should have told the Department that the 'married relationship' between her and the visa sponsor had ceased as soon as she commenced the sexual relationship with the third party.
31. Prior to the hearing, the applicant's representative lodged a submission with the Tribunal (the first submission).¹⁹ This submission was in similar terms to the response to the Notice set out above.
32. At the first hearing the applicant was questioned about the circumstances that gave rise to the cancellation. She said that she knew the visa sponsor had made an application for

¹⁹ Tribunal file, folios 66- 63 (back).

review of the refusal of the partner visa and that this had been successful. She knew of this at the time she had embarked on a brief sexual relationship with the third party. The applicant says that it was not a meaningful relationship. It was a mistake. She was by herself with the children and was finding things difficult. The visa sponsor had continued to support her financially but it was still difficult and the third party assisted her. By the time the visa sponsor came to Kenya in July 2013, the sexual relationship with the third party had ended but she did not discuss this with the sponsor. When the applicant realised she was pregnant she did not disclose this to the visa sponsor for fear of the repercussions and did not tell him until she was in Australia. She hoped that their relationship would be able to continue. However, there were problems after she told him about the birth of her child and they divorced in 2016. Her child was living with a woman in her community in Kenya and she wanted to bring the child to Australia because she was concerned about her daughter's welfare. It was clear the applicant's evidence was in conflict with the narrative recounted in the response provided to the delegate and in the first submission as provided to the Tribunal. This inconsistency was discussed during the hearing. The applicant repeated her oral evidence and said that she knew of the review. She also said that the visa sponsor had continued to support her and she had made a mistake. The applicant was not asked to explain why there was an inconsistency.

33. In a submission lodged with the Tribunal soon after the first hearing (the second submission)²⁰ it was submitted that the narrative of the circumstances leading to the birth of her child in Kenya in the response to the Notice and the first submission were incorrect. It was submitted that this was a problem with the initial translation of the instructions and not with the applicant's evidence. According to the second submission, the evidence given by the applicant at the first hearing was the true position and the response and first submission was a result of mistakes made in translation 'compounded by a well-intentioned effort' by the translator 'to minimise or rationalise the behaviour of the [a]pplicant'.²¹ Because the applicant was unable to read or understand the submission, this issue was not clarified until she gave evidence at the first hearing.²² The matter was discussed by the applicant with the representative immediately after the hearing. In short, the representative submitted that the evidence given by the applicant at the hearing was 'the correct and true version of the events as they happened'.²³
34. The applicant was questioned about this at the second hearing. Her evidence was consistent with the evidence given by her at the first hearing and with the post hearing submission made by her representative. In summary, the applicant said that she knew about the application for review and that it had been successful. She had embarked on a brief sexual relationship with a third party about which she was embarrassed and felt shame. It was a mistake. She did not tell the visa sponsor about the affair for fear of what might happen and she was concerned about this becoming common knowledge in her community in Kenya. She decided not to disclose the truth of the matter until she came to Australia, which she did.
35. In submissions provided to the Tribunal after the second hearing, the representative provided a statutory declaration outlining how the inconsistency arose.²⁴ The representative submits that the applicant's response to the Notice, which was reproduced in the submission to the Tribunal prior to the first hearing, was based on incorrect information conveyed or translated by a friend who also acted as an interpreter for the applicant. It is submitted that this issue was addressed in submissions made by the representative after the first hearing when it was clear that there was an inconsistency. The evidence given by the applicant at

²⁰ Tribunal file, folios 86-90.

²¹ Tribunal file, folio 89 at [1.3.2].

²² Ibid.

²³ Ibid.

²⁴ Tribunal file, folios 127-134.

both hearings represented the true position, namely that she had a brief affair. This was not inconsistent with her commitment to a shared life with the visa sponsor at the time. It is further submitted that in the circumstances of this case, the applicant's 'married relationship' had not ceased. Her sexual relationship with another man is said to have been an aberration. If this is accepted, it is submitted that the obligation to advise the Department about the 'new circumstances' did not arise because there was no new circumstance that made her answer to question 77 incorrect.

36. If the Tribunal accepts the applicant's evidence that her relationship was an affair and that she nonetheless maintained a mutual commitment to a shared life with the visa sponsor, the obligation to disclose does not arise. Relevantly, sexual infidelity by one of the parties to the relationship does not necessarily take the relationship out of the definition of 'spouse' or 'de facto'. The following observations made by Riley FM (as she then was) in *Cao v Minister for Immigration and Anor* (2007) FMCA 225 when referring to the Federal Court decision of Middleton J in *Nguyen V Minister for Immigration and Multicultural Affairs* [2006] FCA 1699 at [36] are apposite:

... [I]nfidelity on the part of a party to a marriage does not necessarily mean that he or she does not meet the definition of spouse in the regulations, but that it is a matter that is to be considered, along with all the other circumstances of the relationship, in determining whether the parties had the requisite mutual commitment.

37. As such, the essential question that requires consideration is whether the applicant's explanation should be accepted.
38. Fact finding on an issue such as this is difficult when the only evidence available to substantiate the applicant's claim is her own evidence. While the Tribunal must be satisfied there is evidence of non-compliance and the onus is not on the applicant to establish compliance, the fact the applicant gave birth to the child of another man at a time when she asserts she was in a 'married relationship' with the visa sponsor warrants critical examination. On any view, this undisputed fact must raise doubt about whether the applicant and the visa sponsor's relationship was 'to the exclusion of all others' or whether it had ceased.
39. There was a report from clinical psychologist, Dr Indi Pattni, about the applicant's mental state. The report was incorrectly dated 2016. At the hearing Dr Pattni clarified that the report was dated 2017 and provided in response to the Notice. This report repeated a sequence of events along similar lines to Mrs Abdi's evidence about the circumstances leading to the birth of her child. In her evidence to the Tribunal, Dr Pattni advised that the narrative in her report was based on information provided to her by the applicant. Dr Pattni is therefore not an independent witness who can substantiate the applicant's claim about what she says happened, although it is relevant that the account given to Dr Pattni is consistent with the applicant's evidence.
40. The Tribunal requested that the applicant or her representative contact the visa sponsor to ask him to give evidence at the hearing. The Tribunal was advised that after making enquiries, they were unable to provide any contact details for the visa sponsor. Given the applicant and the visa sponsor have been divorced for two years, this is plausible. The Tribunal was also unable to locate a contact address for the visa sponsor to make alternative arrangements to require him to give evidence. As such, the Tribunal was unable to independently verify the applicant's evidence about her relationship with the visa sponsor, including her evidence that she had kept the birth of her child a secret from him until after she arrived in Australia.

41. The applicant's sister, Ms Samsan Mohammed Abdi, gave evidence that she lived with the applicant in 2013 and knew that the applicant was having a baby but thought it was the visa sponsor's child. The applicant did not confide in her at that time. Given the limited knowledge of applicant's sister about the circumstances that resulted in the birth of the applicant's daughter, her evidence does not advance the issue, although this evidence is consistent with the applicant's case.
42. In this review, the only direct evidence available to the Tribunal to explain the circumstances that resulted in the birth of her daughter is the evidence of the applicant. The applicant's evidence at both hearings was credible and consistent. This is significant given she was questioned closely about this issue by two Members of the Tribunal on separate occasions. Her evidence was spontaneous, unrehearsed and plausible. The fact the applicant's oral evidence was not consistent with her response to the Notice and the first submission provided to the Tribunal does not undermine her oral evidence at the hearings. The explanation of why these submissions should be rejected is plausible and consistent with other objective facts. Relevantly, the applicant knew about the partner review to the former Tribunal and gave evidence at that review. This is clear from the decision record of those proceedings. It is difficult to understand why the applicant would give evidence she did not know of the review when this was inconsistent with the evidence given and recorded in the previous proceedings. While it is true the applicant's evidence was self-serving, the fact she was questioned over an extended period and remained consistent carries significant weight. It is also relevant to note that the evidence of Dr Pattni and her sister provide some corroboration, albeit limited.
43. The Tribunal is therefore not satisfied that there has been non-compliance with s.104 in relation to question 77.
44. The further issue for consideration is whether there has been non-compliance because of the incorrect answer to question 38. There can be no dispute that once the applicant gave birth to her daughter, the answer to question 38 became incorrect. This gave rise to an obligation to disclose this information to the Department as soon as practicable which, on its face, would be soon after 10 March 2014, when her daughter was born.
45. It is submitted by the applicant's representative that the obligation to disclose new circumstances must be understood in the context of what would be 'reasonably practicable'. It is submitted that it was not 'reasonably practicable' for the applicant to disclose the birth of her daughter until she arrived in Australia. If she had done so this would have jeopardised her relationship with the visa sponsor and would have jeopardised the rest of her family.
46. This submission is rejected. The words 'as soon as practicable' should be given their ordinary meaning. 'Practicable' means 'capable of being put into practice, done or effective, especially with the available means or with reason or prudence': Macquarie Dictionary, 7th edition, 2017. This means that an applicant for a visa has an obligation to inform an officer of the Department of any new circumstances at the time the person becomes aware of those circumstances and is able to communicate them to the Department. Delay may be justified if a person becomes aware of a matter but does not have the means to communicate this information to the Department. The phrase does not mean, as the applicant's representative contends, disclosure when it is 'reasonable to do so having regard to all of the circumstances and the practical consequences' of the disclosure. There are a number of reasons why this interpretation is rejected. First, it does not accord with the plain and ordinary meaning of the words. If this phrase was intended to be given a broader meaning, Parliament would have, at the very least, qualified the phrase by adding the word 'reasonably'. There is no such qualification. Secondly, the phrase has a well understood meaning that is consistent with the purpose of s.104. As such, giving the words 'as soon as practicable' their ordinary meaning does not bring about a perverse or unintended

consequence and there is no justification to read in the additional words contended. It is also relevant to note that the Regulations contemplate that a decision-maker should have regard to the circumstances in which the non-compliance occurred as part of the exercise of discretion.

47. For these reasons, the Tribunal finds that the applicant had an obligation to inform the Department of the birth of her fifth child soon after the child was born and there was non-compliance with s.104 by the applicant in the way described in the s.107 notice in respect of question 38.

Should the visa be cancelled?

48. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2) of the Act.
49. In exercising the power to cancel a visa, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: ss.109(1)(b) and (c) of the Act. As already noted, the prescribed circumstances are those set out in r.2.41 of the Regulations. The applicant provided a response to the Notice and in submissions prior to and after the hearings. A summary of those submissions and the evidence provided which is relevant to the prescribed circumstances is set out below. Not all of the prescribed circumstances are relevant to the current case. For instance, the non-compliance identified was under s.104 and while there were observations about the birth certificate for the fifth child, there was no allegation of non-compliance on the basis that the certificate was a 'bogus document' as defined in s.5(1) of the Act. Accordingly, this issue has not been explored in this decision, other than as part of the discretionary considerations.

The correct information: r.2.41(a) of the Regulations

50. The new circumstance that should have been communicated to the Department was that the applicant had given birth to another child. This information should have been communicated soon after 10 March 2014. This may well have put the Department on notice of a line of enquiry about whether there was a change in the nature of the relationship between the visa sponsor and the applicant. This is a significant issue which weighs in favour of cancellation.

Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information: r.2.41(c) of the Regulations

51. As already noted, if the applicant had informed the Department of the birth of her fifth child, the Department may have undertaken further investigations and may not have granted the Partner (Migrant) (Class BC) Subclass 100 (Spouse) visa in July 2014. This also weighs in favour of cancellation.

The circumstances in which the non-compliance occurred: r.2.41(d) of the Regulations

52. It is contended that the reason why the applicant did not disclose the birth of her child is because of her difficult personal circumstances at the time and the fear of the repercussions revealing this information would have on her community and on her relationship with the visa sponsor. It is accepted that it is possible that if the applicant had disclosed this information to the Department and the visa sponsor became aware of the affair he would not have proceeded with her sponsorship. It is also possible the applicant's community in Kenya

would have discovered that the child was not the biological child of the visa sponsor and she and her family would have been ostracised or discriminated against. While the applicant was the author of her own misfortune, one can have sympathy for the applicant's situation living in a country where she had little support. This explains her silence of the matter. On balance, this factor weighs against cancellation.

The present circumstances of the visa holder: r.2.41(e) of the Regulations.

53. The applicant has resided in Australia since August 2014. She has given birth to another child in Australia as a result of a new relationship. Her child was born on 1 October 2016 and is an Australian citizen.²⁵ Her other children are aged 17, 15, 14 and 13. They reside and attend school in Australia. There is no dispute that if the applicant's visa remains cancelled, there will be significant upheaval for this family. The children have lived in Australia for four years and there is evidence they have become integrated into the Australian community. It is unclear whether the applicant would leave her Australian born child in Australia or take the child with her if she was required to return to Somalia or Kenya. This creates a difficult decision for the applicant. As observed by the delegate the presence of the applicant's young children in Australia, 'significantly weigh' in her favour and weigh against cancellation.²⁶

The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act; r.2.41(f) of the Regulations

54. The applicant provided a response to the Notice that was not correct. For the reasons outlined earlier, the Tribunal accepts the explanation of the inconsistency. This does not of itself weigh in favour of cancellation.

Any other instances of non-compliance by the visa holder known to the Minister and any breaches of the law since non-compliance: rr.2.41(g) and (i) of the Regulations

55. According to the delegate, the birth certificate provided by the applicant in support of the application for a child visa was bogus. The certificate was dated December 2014 but the applicant conceded in her response to the Notice that her daughter was born in March 2014. This alleged non-compliance was not the subject of the Notice under s.107 and therefore was not the basis for the cancellation. However, this issue was raised by the delegate in the context of the exercise of discretion.²⁷ When questioned about this at the first hearing and in post hearing submissions, the applicant stated that she asked friends in Nairobi to obtain the certificate for her when she was in Australia.²⁸ She did not realise it was 'bogus'.²⁹ In her response to the Notice, she readily conceded her daughter had been born at the earlier date and did not attempt to conceal this. The applicant's evidence is somewhat unconvincing. While it can be accepted that the applicant requested that a friend obtain the certificate and that she was not a part of the issue of a false document, it must have been apparent to her on receipt that the document was incorrect. This weighs against the applicant.
56. In the other hand, there is no evidence that the applicant has otherwise breached the obligations under the Act or that there are other instances of non-compliance. Nor is there any evidence that there have been any breaches of the law since her non-compliance. As such, these matters do not weigh in favour of cancellation.

²⁵ Tribunal file, folio 63 at [3.4].

²⁶ Tribunal file, folio 17 at [61].

²⁷ Tribunal file, folio 16 at [64].

²⁸ Tribunal file, folio 89 (back) at [1.4.1].

²⁹ Tribunal file, folio 88.

The time that has elapsed since the non-compliance and any contribution made by the holder to the community: rr.2.41(h) and (j) of the Regulations.

57. It has been four years since non-compliance and the applicant has been living in the community since her arrival in Australia for nearly four years. The applicant submits that she assists new arrivals integrate into the Somali community and the wider Australian community. There is no independent evidence before the Tribunal in support of this. However, the Tribunal is prepared to accept this submission on face value and notes that a number of members in the Somali community in Perth attended both hearings to support the applicant. This provides some evidence in their regard for the applicant's contribution to the community. These factors weigh against cancellation.

Other considerations

58. As noted, the prescribed circumstances are not exhaustive. This was recognised by the delegate who had regard to the impact that the cancellation of the applicant's visa would have on the applicant's six dependents.³⁰ Their visas would also be cancelled under s.140 of the Act. The applicant has four children who are minors. Her step sister and niece are no longer minors but her step sister had a child in 2016 who is now two years old. The consequential cancellation of these visas would have a significant impact on the family and the two children who have been born in Australia. The children who came to Australia with the applicant and who have been living here for nearly four years would be uprooted from Australia. The children who are Australian citizens would either be separated from members of their immediate family, including their respective mothers, or they will return with the applicant to Somalia. According to a letter from Mr Will Groom of MercyCare Community Services, the applicant's sister is living independently in the community and is a volunteer at the Aged Care Services Directorate.³¹
59. There can be no dispute that the impact of cancellation on the other applicants, and in particular the applicant's minor children and the child of her step sister, should be given significant weight. This was conceded by the delegate at [69] of the decision record.³²
60. The delegate properly identified Australia's obligations under the CROC but concluded that the applicant's children may not face separation from the applicant as the applicant could make an application for protection if she fears harm in returning to Somalia.³³ It is possible that the applicant could make such a claim but if her claim is not successful because her fears do not give rise to Australia's non-refoulement obligations there will be a risk of separation of the children who hold Australian citizenship from their mothers or relocation to Somalia. Either is unlikely to be in their best interests. First, it can be accepted that separation of children from their parents and siblings is likely to be detrimental to their wellbeing. Secondly, it can also be accepted that if the Australian children relocate with their mothers, they are less likely to have the same quality of life and opportunities in Somalia than they would have in Australia. In summary, the interests of the Australian children may also enliven obligations under the CROC and this weighs against cancellation.

Conclusion on the exercise of the discretion

61. In considering all of the relevant circumstances, I give significant weight to the fact that the applicant should have advised the Department of the birth of her fifth child prior to the grant of the visa. This may have had an impact on decision to grant that visa in July 2014. The Department may have accepted the applicant's explanation for the birth of the child who is

³⁰ Tribunal file, folios 15 - 16.

³¹ Tribunal file, folio 98.

³² Tribunal file, folio 16.

³³ Tribunal file, folio 15 at [73].

not the biological child of the visa sponsor or it may not have. The important consideration is that the Department officers should have had the opportunity to make a decision on the grant of the visa by reference to all relevant information. If the Department again refuse the applicant's visa, the visa sponsor may have again sought review or he may have decided not to proceed in the circumstances. The visa sponsor was not available to give evidence and as there is no evidence about this matter; either way this is mere speculation. Nonetheless the integrity of the visa system is important and the factors relevant to those matters weigh in favour of cancellation.

62. Against this, the applicant's current circumstances, the length of time that has elapsed and significant the impact on her family and, in particular her children and the Australian children in the family, weigh strongly against cancellation.
63. Having considered the matters carefully, I have decided to exercise the discretion in favour of the applicant and have decided the visa should not be cancelled.

Conclusions

64. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act.
65. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should not be cancelled.

DECISION

66. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 100 (Spouse) visa.
67. The Tribunal has no jurisdiction with respect to the other applicants.

Jan Redfern
Deputy President

ATTACHMENT – *Migration Act 1958* (extracts)

104 Changes in circumstances to be notified

- (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.
- (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
- (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
- (4) Subsection (1) applies despite the grant of any visa.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
 - (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
 - (d) setting out the effect of sections 108, 109, 111 and 112; and
 - (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
 - (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.

- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.